



IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1032

DONALD HUDKINS, individually and as Superintendent of the Indiana State Farm,
NORMAN McDONALD, individually and as the Assistant Superintendent of the Indiana State Farm,
PHILIP H. BADGER, individually and as the Director of Treatment and Classification at the Indiana State Farm,
ROBERT E. PARSONS, individually and as the Recreation Director at the Indiana State Farm,
DALE PAT NIXON, individually and as a Counselor at the Indiana State Farm, and
ROBERT HEYNE, individually and as the Commissioner of the Department of Correction,

Petitioners,

vs.

ROY BUISE,

Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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QUESTION PRESENTED

Whether the respondent's First Amendment associational rights were violated by the petitioners' absolute proscription against jailhouse lawyering.

STATEMENT OF THE CASE

The respondent, Roy Buise, was a prisoner of the State of Indiana.¹ In January of 1974 he was transferred from the Indiana State Prison to the State Farm where he was assigned the job of Librarian. During his stay at the State Farm, Buise was barraged by requests from his fellow prisoners for legal advice (Buise had been a writ writer while at the State Prison). Buise in fact assisted one prisoner in the preparation of a writ. Although the state public defender gave only irregular and undependable attention to requests for legal assistance, the petitioners strictly enforced a policy prohibiting the provision of any such assistance by the inmates themselves. In addition, Buise made requests to prison officials that they establish a law library, writ room, and inmate counsel.

In March of 1974, Buise was returned to the State Prison, an institution with living conditions significantly less favorable than those enjoyed by Buise at the State Farm. Buise then brought suit contending that he was transferred solely because he engaged in constitutionally protected activities. He sought declaratory relief, a retransfer to the State Farm, and monetary damages. The trial court agreed with Buise that his activities as a writ writer, accompanied by his attempts to establish a law library, writ room, and inmate counsel, were all significant factors in the decision to return him to the State Prison. However, the Court held that a transfer predicated on the foregoing reasons did not trench upon Buise's constitutional rights. The Court of Appeals reversed and remanded the case to the District Court for further proceedings.

¹Buise has since been paroled and is no longer confined in any of Indiana's penal institutions.

REASONS FOR DENYING THE WRIT

In reaching its result, the Court of Appeals found it appropriate to analyze Buise's claim for declaratory and injunctive relief separately from his request for damages. With respect to the former, the Court held, consistently with *Johnson vs. Avery*, 393 U.S. 483 (1969), that prisoners have the right of access to a jailhouse lawyer in the absence of a reasonably adequate opportunity to obtain legal assistance from other sources. The Court then concluded that the petitioners had failed to prove the existence of such a reasonably adequate opportunity, and following *Johnson vs. Avery, supra*, held that Buise had standing to assert this right of his fellow prisoners, and was therefore entitled to declaratory relief and a retransfer to the State Farm. The petitioners have not called into question this portion of the lower court's holding.

The Court of Appeals then took up Buise's claim for damages. It held that such a claim cannot be predicated on violations of the rights of third parties. Rather in order to recover damages, Buise must show that some right personal to himself was infringed by the petitioners' absolute prohibition of his writ writing activities. The Court found such a right in the First Amendment's protection of associational rights. It is this holding to which the petitioners take exception.

The petitioners concede that under *Pell v. Procunier*, 417 U.S. 817 (1974), a prisoner may be stripped only of those First Amendment rights which are incompatible with his status as a prisoner or which frustrate the state's legitimate penological objectives. (Petition for Writ of Certiorari, p. 5) This analysis applies whether the right in question implicates speech, worship, association or any other activity protected under the First Amendment. *Jones vs. North Carolina Prisoners Labor Union, Inc.*, 433 U.S. 119 (1977). In *Jones, supra*, this Court, even while recognizing

that imprisonment is the quintessential limitation on associational rights, was careful to approve only those additional restrictions which further reasonable considerations of penal management. *Jones, supra*, 433 U.S. at 132. Conversely, it would be objectionable to interfere with the legitimate, approved associational activities of inmates.

Of course, there is no question that, given the appropriate circumstances, prisoners have the right to have a "jailhouse lawyer," and the petitioners do not question the lower court's determination that those circumstances were extant in the instant case. Nevertheless, the petitioners would have this Court bring the weight of its plenary consideration to the question of whether prison officials may, in the teeth of this right to have a jailhouse lawyer, enforce an absolute prohibition against any prisoner being a jailhouse lawyer.

Moreover, the petitioners would urge this Court to adopt the position that legal assistance can be given and received without implicating some degree of associational activity between the donor and recipient.

The answer to these contentions is firmly imbedded in the logic of the law. The right to be a "jailhouse lawyer" arises simultaneously with the right to have one. This Court recognized this logical and natural connection between the two concepts in *Johnson vs. Avery, supra*, 393 U.S. at 490.

Furthermore, where an inmate has the right to give legal assistance, there must be a related right to associate with his fellow prisoners for that purpose. That this latter right rises to constitutional dimensions has been settled by *NAACP vs. Button*, 371 U.S. 415 (1963), which held not only that the right to associate for the purpose of providing legal assistance falls within the ambit of the First Amendment's protections but also that this right was personal to the

provider of such assistance as well as to the recipient. See also, *In re Primus*, ___ U.S. ___ 98 S. Ct. 1893 (1978).

The anomaly perceived by the petitioners between the contrasting right of free layman to be lawyers and that of prison inmates raises a false issue. Nothing in the lower court's opinion derogates the authority of the State of Indiana to regulate the practice of law, subject only to appropriate First Amendment considerations. *In re Primus, supra*. In the context of the instant case, the petitioners may absolutely proscribe writ writing by inmates simply by implementing a constitutionally adequate public defender system in the prison.

Nor is there anything novel in the notion that a prison inmate might, in certain narrowly defined contexts such as those at bar, have a right to give legal assistance where free laymen do not. This Court, in *Johnson vs. Avery, supra*, recognized that the preparation of petitions for post-conviction relief "is a function often, perhaps generally, performed by laymen." *Johnson, supra*, 393 U.S. at 490, n. 11. Thus, the Court of Appeals has broken no new ground nor has it conferred any new rights on inmates. It in no way expands upon the traditional role performed by prisoners in assisting their fellow inmates to gain access to the courts.

Buise's arguments may be summarized as follows. An inmate retains all his First Amendment rights which are not at odds with legitimate penological concerns. This includes associational rights. An inmate may provide legal assistance to other inmates whenever prison officials fail to make adequate representation from other sources available. The Court of Appeals held that the petitioners did not in fact make such representation available. Consequently, Buise's conduct in providing such assistance falls squarely within the ambit of *Johnson vs. Avery*,

supra. Since his actions were proper, he retains his First Amendment associational rights to the minimum extent necessary to facilitate those actions. Therefore, the action of the petitioners in absolutely forbidding him to associate with his fellow prisoners for the purpose of engaging in a protected activity was in derogation of his associational rights under the First Amendment.

Finally, the petitioners argue that the decision of the Court of Appeals is in conflict with this Court's decisions in *Meachum vs. Fano*, 427 U.S. 215 (1976), and *Montanye vs. Haymes*, 427 U.S. 236 (1976), which held that due process does not require a hearing to test the transfer of a state prisoner from one institution to another. Of course, procedural due process is not an issue in the instant case, thus distinguishing it from *Meachum* and *Montanye*. More importantly, the petitioners blatantly ignore this Court's caveat in *Montanye, supra*, 427 U.S. at 242, where the Court warns that a disciplinary or punitive transfer will not trigger a right to a due process hearing only so long as "the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him and are not otherwise violative of the Constitution . . ." *Id.*, (emphasis added.) Mr. Justice Stevens, in his dissent in *Montanye*, emphasizes this limitation on the scope of the majority's holding. On remand, the Second Circuit Court of Appeals held that Haymes could not have been transferred for exercise of his protected First Amendment rights. This Court declined an opportunity to review that holding. *Haymes vs. Montanye*, 547 F. 2d 188 (2nd Cir. 1976), cert. den. 427 U.S. 967 (1977). Thus, to the extent that the petitioners are claiming that Buise could have been transferred in retaliation for the exercise of his First Amendment rights, their arguments are clearly without merit.

The conclusions of the Court of Appeals are controlled by the principles established by this Court. They do not assume any undecided points of law nor do they require any intuitive leaps across uncharted areas. Under these circumstances, this Court should deny petitioners' request for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the respondent prays that this Court deny the petitioners' request for a writ of certiorari.

Respectfully submitted,

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